

TRUST TERMINATION AND UNBORN BENEFICIARIES

In dealing with trusts courts are reluctant to deprive beneficiaries of their interests by terminating the trust agreement except where the beneficiaries, by giving their consent, have shown a desire for such termination. When all the beneficiaries consent, a court generally allows termination of the trust before the fulfillment of its purpose, because there is no compelling reason to perpetuate a trust after all persons beneficially interested have agreed to its termination.¹ Nevertheless termination poses problems for the settlor of a trust limited to himself for life with a remainder over to his issue or to his heirs.² The settlor may be able to obtain the consent of those potential heirs who are living at the time of the proposed termination, but the consent of the possible beneficiaries who are yet unborn (or unascertained) at that time is also required.³ This seems to be a harsh result for a settlor who has set up the trust mainly for himself during his lifetime and who now desires, perhaps for need of extra income, to terminate the trust and recapture the corpus. Realizing the harshness of this result, but at the same time recognizing the basic rule that decrees and judgments are not binding on those interested parties who are not before the court,⁴ courts have sought ways to ascertain the rights and affect the interests of the unborn.

I. VIRTUAL REPRESENTATION

One method courts have used to manipulate the interests of the unborn is that of virtual representation.⁵ Under this doctrine

¹ RESTATEMENT (SECOND) OF TRUSTS § 338 (1959); IV A. SCOTT, *THE LAW OF TRUSTS* § 338 (3rd ed. 1967); G. BOGERT, *TRUSTS AND TRUSTEES* §§ 1007-1008 (2d ed. 1962).

² A remainder limited to the heirs of the settlor in many states invokes the doctrine known as worthier title. This article does not discuss the application of that doctrine. For discussions of worthier title and its use in the modification or termination of trusts see 66 COLUM. L. REV. 1552 (1966); 42 NOTRE DAME LAW. 542 (1967); 28 OHIO ST. L.J. 166 (1967); 42 WASH. L. REV. 919 (1967). Note also that these articles deal with the irrevocable trust.

³ *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955).

⁴ This is probably one of the oldest principles of law. *Mason v. Eldred*, 73 U.S. 231 (1867).

⁵ *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938); *In re Campbell's Estate*, 46 Hawaii 475, 382 P.2d 920 (1963); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 488, 112 S.E.2d 396 (1960); L. SIMES AND A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1803 (2d ed. 1956); RESTATEMENT OF PROPERTY §§ 182-185 (1936); Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580 (1936).

the unborn are represented by the living beneficiaries, or more formally, the unborn may be bound by the living representatives of the same class or by those who have interests so similar as to effectively protect the interests of the unborn. Virtual representation is not a new doctrine and has been applied in many situations, such as suits to quiet title, partition suits, and proceedings to sell land affected with a future interest. Like the appointment of the guardian ad litem, discussed below, it is a rule of convenience designed to avoid waiting for the possible birth of new claimants, which could mean waiting for another generation.

Virtual representation may operate in either of two ways. Members of a class of beneficiaries who are alive may represent the unborn members of the same class in litigation because of the similarity of their estates.⁶ For example, *A*, the settlor, limits certain property to himself for life with a remainder to his children. At the time *A* wishes to terminate the trust, he has two children; but, as courts have said, the possibility of issue is never extinct. The unborn in this case may be represented by the living children of *A*, and a decree or judgment against them would be binding.

In some jurisdictions the question has arisen whether, in order for a court to have jurisdiction to affect the rights of unborn parties, the representatives must be of the same class as the unborn whom they represent.⁷ In other words, the question is whether issue must represent issue, both being entitled to the same interest, or whether any living beneficiaries may represent unborn beneficiaries of a like interest, regardless of similarity of class. This problem particularly arises when there is no person alive of the same class as the possible unborn beneficiary. For example, in a trust set up by *A* with income for life to *B*, remainder to the children of *B*, what happens if *B* wishes to terminate but at the time has no children? Can there be any representation of, and therefore binding decree upon, the unborn? The majority view seems to be

that the doctrine of representation must have the flexibility born of convenience and necessity, and that if the interests of unborn contingent remaindermen are sufficiently represented

⁶ RESTATEMENT OF PROPERTY § 184(d) (1936); Roberts, *supra* note 5, at 582; Comment, *California Procedures for Obtaining Judicial Decrees Binding on Unborn or Unascertained Persons*, 5 HASTINGS L.J. 199 (1954).

⁷ *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 488, 112 S.E.2d 396 (1960).

so they can be protected by the court, the prerequisites for application of the doctrine are satisfied.⁸

Thus where there are no living members of the same class the unborn may still be represented, perhaps by persons whose estates precede or follow those of the unborn.

The idea of having representation by members of a class different from that of the unborn is exemplified by the second basic way in which virtual representation operates, that is, where the unborn beneficiaries are represented by the holder of the prior estate. This came into use in the English courts when the first tenant in tail represented the interests of the unborn remaindermen.⁹ Under this reasoning, in the trust set up by *A* to *B* for life with the remainder to the children of *B*, the life tenant would be able to represent his unborn children as the holder of the prior estate.¹⁰

The doctrine of virtual representation would seem then to be flexible in application and useful in terminating a trust while providing the unborn heirs with representation in court.¹¹ Based as it is on the self-interest of the representative and the similarity of his interests to those of the unborn he represents, virtual representation should be available in most cases involving a determination of the rights of unborn where there are living parties with like interests.

Limitations are placed on the doctrine, but not such as would impair its flexibility. Thus there is a requirement that "one member of the group cannot represent the others in a case where, under the issue before the court, their interests would be adverse."¹² The similarity of estates between the living representatives and the unborn merely raises a presumption, which prevails in most cases, that there is a similarity of interest in the question before the court.

⁸ *Gunnell v. Palmer*, 370 Ill. 206, 209, 18 N.E.2d 202, 204 (1938). See Annot., 120 A.L.R. 876 (1939).

⁹ RESTATEMENT OF PROPERTY § 184(b) (1936); Roberts, *supra* note 5, at 584; 5 HASTINGS L. J., *supra* note 6, at 208.

¹⁰ *Miller v. Texas & Pac. Ry.*, 132 U.S. 662 (1890); *Rodgers v. Unborn Child or Children of Rodgers*, 204 Tenn. 96, 315 S.W.2d 521 (1958); RESTATEMENT OF PROPERTY § 184(d) (1936); L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 49 (2d ed. 1966).

¹¹ Also note that this flexibility may be enhanced in certain circumstances where it is possible to have the trustee represent the unborn. RESTATEMENT OF PROPERTY § 186 (1936).

¹² L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1804 (2d ed. 1956).

This may be rebutted by evidence showing actual adversity to the interests of the unborn.¹³ A second requirement is that there be no fraud or collusion between the representatives and the party seeking to terminate the trust. It is the duty of the court in the first instance to determine whether these requirements are met and whether such representation is in the best interests of the unborn.¹⁴

II. GUARDIAN AD LITEM

The second way which the courts, and in this case many state legislatures, have provided for affecting the interests of the unborn is by the appointment of a guardian ad litem. Like virtual representation the use of the guardian ad litem to represent the interests of the unborn is not a recent development.¹⁵ It too may be used to bypass the basic rules standing in the way of trust termination: (1) that termination is not possible without the consent of all beneficiaries, and (2) that a decree or judgment is not binding on those interested persons who are not made a party to the proceedings.

The guardian ad litem is a special guardian appointed by the court to represent a party who is under a disability—here the unborn beneficiary.¹⁶ He is an officer of the court which appointed him and is subject to the supervision and control of that court.¹⁷ He is limited to acting as attorney for the particular persons he was designated to represent and to protect and advance the interests of those

¹³ For example, if the settlor was also the income beneficiary and wished to terminate the trust he would not be able to represent the unborn heirs even though he is the holder of a prior estate. His interest in termination would be adverse to that of the unborn beneficiaries under the trust.

¹⁴ *Bennett v. Fleming*, 105 Ohio St. 352, 137 N.E. 900 (1922). This can also be inferred from *RESTATEMENT OF PROPERTY* § 185 (1936) and from general language on adequate representation in *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938). See L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1804 (2d ed. 1956).

¹⁵ *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955); *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659, *cert. denied*, 317 U.S. 670 (1942); *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938); *Robinson v. Barrett*, 142 Kan. 68, 45 P.2d 587 (1935); *Loring v. Hildreth*, 170 Mass. 328, 49 N.E. 652 (1898); *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 11 S.E.2d 464 (1940); *In re Wolcott*, 95 N.H. 23, 56 A.2d 641 (1948); *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 488, 122 S.E.2d 396 (1960); *RESTATEMENT OF PROPERTY* § 182 (b) (1936).

¹⁶ *In re Schrier's Estate*, 157 Misc. 310, 283 N.Y.S. 233 (Sur. Ct. 1935). See generally Note, *Guardians Ad Litem*, 45 IOWA L. REV. 376 (1960).

¹⁷ *Tyson v. Richardson*, 103 Wis. 397, 79 N.W. 439 (1899).

persons.¹⁸ In this capacity he is a fiduciary. The duty to represent the unborn beneficiaries means that "[t]he representation by the guardian must be real and not merely formal";¹⁹ the guardian must do more than simply file an appearance and give consent to termination. There must be a showing that it would be in the best interests of the unborn to terminate the trust, if that is possible, or that the interests of the unborn under the trust have been replaced by something equally beneficial, as the result of some settlement or compromise the settlor or person seeking to terminate the trust has made with the guardian. Without such a showing the guardian has no authority to consent to termination.²⁰

Although there has been some question as to the power of a court to appoint a guardian ad litem without statutory authorization,²¹ the majority view now is that courts have this inherent equity power.²² Courts have acted in many ways on the interests of the unborn in property litigation, and there would seem to be little difference in the effectiveness of representation by a guardian ad litem whether appointed with or without statutory authority. This question has become academic in many states since the enactment of statutes which do provide for such appointment of guardians ad litem to represent interests of the unborn or unascertained.²³ These

¹⁸ *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal App. 2d 657, 267 P.2d 423 (1954); *Clarke v. Chicago Title & Trust Co.*, 393 Ill. 419, 66 N.E.2d 378 (1946); *Morgan v. Hamlet*, 345 Ill. App. 107, 102 N.E.2d 365 (1951).

¹⁹ *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81, 87 (1955).

²⁰ *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 11 S.E.2d 464 (1940); *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944); *In re Small's Estate*, 67 York Leg. Rec. 1 (Pa. Orphans' Ct. 1953).

²¹ *Moxley v. Title Ins. & Trust Co.*, 154 P.2d 417 (Cal. Dist. Ct. App. 1945), *aff'd*, 165 P.2d 15 (1946); *McPherson v. First & Citizens Nat'l Bank*, 240 N.C. 1, 81 S.E.2d 386 (1954). For a statute enacted shortly after the decision in the *Moxley* case see CAL. CODE CIV. PROC. § 373.5 (West 1954).

The RESTATEMENT OF PROPERTY bases its rule on statutory authority only and expressly makes no commitment as to the power of courts to appoint a guardian ad litem as a matter of the inherent power of the court. RESTATEMENT OF PROPERTY § 182, comment on clause (b) (1936).

²² *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Leonardini v. Wells Fargo Bank & Trust Co.*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955); *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659, *cert. denied*, 317 U.S. 670 (1942); *Smith v. Lamb*, 103 Ga. App. 157, 118 S.E.2d 924 (1961); *Gunnell v. Palmer*, 370 Ill. 206, 18 N.E.2d 202 (1938); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 468, 122 S.E.2d 396 (1960).

²³ CAL. CODE CIV. PROC. § 373.5 (West 1954); ILL. REV. STAT., ch. 22, § 6 (1959); MASS. ANN. LAWS, ch. 203, § 17 (1955); MD. RULES PROC., Rule 275 (1961); MICH.

statutes generally provide the court with power to appoint a disinterested third party to defend and protect the interests of the unborn. They also provide the judgment shall be conclusive on all persons the guardian ad litem represents.

III. PROTECTING THE UNBORN BENEFICIARIES

It would seem then that both virtual representation and the appointment of a guardian ad litem could provide the representation necessary for termination of an irrevocable trust and entry of a decree binding on the unborn. Virtual representation would be available in most cases and would be the easiest to apply, since the representatives are necessary parties to the proceedings. It would also eliminate the extra cost involved in the appointment of a guardian. But, from the standpoint of protection of the unborn, the appointment of the guardian ad litem appears to be in their best interests. While virtual representation is based on the self-interest of the representative and its similarity to that of the unborn, there is always the possibility that adverse interest could play a part, despite the role of the court in screening the representatives. The guardian ad litem, on the other hand, is a disinterested third party, usually an attorney, who is selected and closely supervised by the court. This not only diminishes the possibility of collusion, but also has the administrative advantage of relieving the court of a determination as to collusion or adversity in the representative.

The representative under virtual representation is under no real duty to actively pursue the interests of those he represents. This stems from the nature of the doctrine itself. Fair representation requires only that he act in his own self-interest. The interest of the representative, however, may turn out to be different from that of the unborn heirs.²⁴ "If the representative fails to adequately protect the beneficiaries and this is not apparent to the court in the original suit, the settlement which he makes may be attacked later and the termination declared ineffective."²⁵ The guardian ad

STATS. ANN. § 27.3178 (212) (1947). Other state statutes provide for guardians ad litem in special situations. IOWA CODE ANN., Rules Civ. Proc., Rule 298 (1943) (partition suits); KAN. STATS. ANN. § 59-2254 (1964) (trust accounting); OKLA. STATS. ANN. tit. 12, § 1147.3 (1961) (proceedings to sell real estate); VA. CODE, tit. 8, § 8-703.1 (1950) (sale or lease of property).

²⁴ *Bennett v. Fleming*, 105 Ohio St. 352, 137 N.E. 900 (1922); *Roberts*, *supra* note 5, at 590.

²⁵ *Miller v. Texas & Pac. Ry.*, 132 U.S. 662 (1890); *McArthur v. Scott*, 113 U.S. 340 (1885); *Mortimore v. Bashore*, 317 Ill. 535, 148 N.E. 317 (1925); *Legislation*, 48 HARV. L. REV. 1001, 1003 (1935).

litem, on the other hand, has a fiduciary duty to the unborn and may be made personally to respond in damages for any negligence or failure of representation.²⁶ When the guardian is appointed pursuant to a state statute, settlements approved by the court have binding effect,²⁷ which means that instead of upsetting the decree of termination by the court, the subsequent heirs may sue the guardian for breach of his fiduciary duty. Given this personal liability, the guardian will be unlikely to act in anything but the best interests of those he represents.

The comparison between virtual representation and the appointment of the guardian ad litem shows not only the advantages of the appointment of the guardian, but also that the best way to safeguard the interests of the unborn and provide for a decree of binding effect is to always have the extra protection of the guardian ad litem. Because virtual representation is available in most cases, it may be used to fall back on if the appointment should fail for one reason or another.

IV. FINDING A QUID PRO QUO

Once the appointment of the guardian ad litem has been made, the question becomes one of whether to grant termination of the trust. The problem at this point is not whether the court may render a binding decree against the unborn, for that is provided for in the statutes of many states and is the common law of others. The heirs who do come into being will sue the guardian ad litem rather than try to upset a decree under these statutes. But now that the court has appointed his disinterested third party who may be liable to his "wards" for failure of representation, the question arises: Have we effectively sealed off the possibility of termination? It at once becomes apparent that the answer to this is "yes," except in a very few cases. It is a foregone conclusion that the guardian ad litem must receive some sort of *quid pro quo* in return for his consent to termination. Because of his responsibility to represent the best interests of the unborn, to merely consent to termination without receiving any consideration would likely be a breach of his fiduciary duty.²⁸ Moreover, the courts, having close supervisory powers over the guardian as a court appointee, will not allow it.

²⁶ *Dixon v. United States*, 197 F. Supp. 798 (W.D.S.C. 1961); *In re Jacger's Will*, 218 Wis. 1, 259 N.W. 842 (1935).

²⁷ CAL. CODE CIV. PROC. § 373.5 (West 1949); ILL. REV. STAT., ch. 22 § 6 (1959).

²⁸ *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Leonardini v. Wells Fargo Bank & Trust Co.*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955). These two cases

A guardian ad litem has no authority, without valid consideration, to relinquish the rights of the infant defendants whom he represents.²⁹

[I]n the absence of any evidence that the unborn remaindermen would be so benefited, the guardian is without power to consent to direct invasion of the unborn remaindermen's rights.³⁰

The question then becomes one of finding a satisfactory *quid pro quo* which will be acceptable to the guardian ad litem.

Many articles have been written on the possible considerations to be given in return for modification of the trust agreement or an invasion of the corpus,³¹ but termination poses a different problem. With the termination of the trust agreement the entire interest of the beneficiary under the trust is cut off. Thus it would seem the *quid pro quo* must be commensurate with the value of the estate the beneficiary would have received had the trust not been terminated or presumably the guardian ad litem will not consent to the agreement. In light of this consideration, some *quid pro quos* suggested for modification are not plausible for termination. For example, if a compromise agreement states that the settlor or other person wishing to terminate will make some sort of provision in his will for the unborn contingent remaindermen, there can be no guarantee any assets will be left in the estate when such person dies.³² Thus such a solution is not feasible in the termination situation. If there is only a modification of the trust or an invasion of the trust corpus, the compromise agreement is still in a sense secured by a concrete sum, the remainder of the trust corpus. In order for the guardian ad litem to consent to termination, that term-

deal with modification of the trust agreement. Cases dealing with termination are *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 267 P.2d 423 (1954), and *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 11 S.E.2d 464 (1940).

²⁹ *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 491, 11 S.E.2d 464, 468 (1940).

³⁰ *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81, 87 (1955); see G. BOGERT, TRUSTS AND TRUSTEES § 1007 (2d ed. 1962). For a good discussion of duties and responsibilities see *In re Small's Estate*, 67 York Leg. Rec. 1 (Pa. Orphans' Ct. 1953).

³¹ 66 COLUM. L. REV. 1552 (1966); 42 NOTRE DAME LAWYER 542 (1967); 42 WASH. L. REV. 919 (1967).

³² Another possible consideration for modification of a trust is the abandonment of a suit which will possibly result in a decree declaring the trust invalid. *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659, cert. denied, 317 U.S. 670 (1942); *Hardy v. Bankers Trust Co.*, 137 N.J.Eq. 352, 44 A.2d 839 (Ch. 1945). *In re Small's Estate*, 67 York Leg. Rec. 1 (Pa. Orphans' Ct. 1953).

ination agreement must also be secured by some sort of assured provision for the remaindermen. The logical place from which this provision would come is the trust corpus, which brings the interest of the guardian into conflict with that of the settlor wishing to terminate and regain the corpus. Such conflict places yet another impediment in the way of termination. Because of lack of standards or criteria for determining whether a certain *quid pro quo* is beneficial to the unborn, and because of the possibility that he may have to answer to the persons coming into being who are not satisfied with the agreement, the guardian ad litem is likely to be very conservative in giving his consent to any termination agreement.

If the settlor has set up a trust giving himself a power of appointment by which he can dispose of the assets in the trust corpus as he chooses, he may have a fairly strong bargaining position to use against the guardian ad litem.³³ In such a case the interest of the unborn heirs is "doubly contingent" in that they will take only if (1) they come into being and (2) the settlor does not exercise his power of appointment thereby ending all their interest under the trust instrument. Here there is definitely good consideration for consent to modification of the trust agreement. In return for the invasion of the trust corpus the settlor releases his power of appointment and makes the interest of the unborn certain to vest if they come into being.³⁴

The same may be true in the case of *termination* of a trust where the settlor has reserved a power of appointment. Certainly the mere release of the power could not be consideration if the trust were terminated. If, however, the settlor set up some sort of trust fund for the unborn while at the same time releasing the power of appointment, the guardian ad litem and the settlor might be able to make a compromise agreement and the trust terminated. The interest of the unborn beneficiaries in the new fund which was set up would be decreased in monetary value, but it would now be certain to vest if they came into being.

But when the person seeking termination of the trust holds no power of appointment the possibilities of compromise are greatly diminished, if not completely erased. For example, *A* sets up a trust with income to himself for life and remainder to his children. *A* wishes then to terminate the trust at a time when he has one child, and for that purpose a guardian ad litem is appointed to represent

³³ Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

³⁴ *Id.*

the unborn children of *A*. The guardian will not consent to the termination because there is no consideration which *A* could give that would be in the best interests of the unborn.³⁵ *A* could set up a separate trust fund for the benefit of the unborn; but logically he cannot, or will not, do this if his attempt to terminate is motivated by a desire to take back the trust corpus. Since the only contingency on the interest of unborn beneficiaries is that of coming into being, the amount contained in the compromise trust would have to be as great as in the one terminated, and *A* would have gained nothing. If the settlor was only willing to offer something less than the amount which the unborn would receive under the existing trust, which would seem logical, the guardian ad litem would consider it best to wait for the possible birth of issue and not consent to termination. The situation then is a stalemate, with the result that the trust will continue until the interest has vested in possession or the meeting of the contingency has become an impossibility.

V. USE OF THE REFUNDING BOND

The Pennsylvania courts have found an answer to this stalemate, or at least it has been suggested that it may be the answer.³⁶ A refunding bond is given to the trustee by those persons taking distributive shares of the corpus on termination. The bond is given upon the condition that the distributees will refund that portion of the distribution they have received if a person who has an interest comes into being. The settlor attempting to terminate the trust would take the corpus and in return give a refunding bond to the trustee. If remaindermen come into being the settlor refunds the corpus and the remaindermen take the shares to which they are entitled.

But is this really the answer to the problem of furnishing consideration for consent to termination? The Pennsylvania courts have confined the use of this bond to cases in which there was only a remote chance of newborn remaindermen and where the trust had all but dried up.³⁷ This would seem to be the only possible situation

³⁵ It would not be unusual for the guardian to object to termination in this situation. *Liberty Trust Co. v. Weber*, 200 Md. 491, 90 A.2d 194, *modified*, 200 Md. 491, 523, 91 A.2d 393 (1952). *See also* *Duffy v. Duffy*, 221 N.C. 521, 20 S.E.2d 835 (1942).

³⁶ *Bowen Estate*, 3 Pa. D. & C. 2d 401 (Orphans' Ct. 1955).

³⁷ *Id.*

in which to use this type of consideration. If it were used in a case where there was a good or even fair chance that remaindermen would come into being the trust would in most cases not be terminated, but merely held in abeyance for a generation or two until remaindermen were born. Furthermore, its use by the Pennsylvania courts only where there is not a great likelihood of new remaindermen suggests that the costs of such a bond might be prohibitive if used in a case in which there was a good or fair chance of remaindermen. Thus the expectations of the settlor who is terminating the trust would certainly be defeated. In the end most of the trust corpus would be consumed in procuring the bond and there would be no reason to terminate.

VI. PROBLEMS OF TERMINATION

The prospects for termination seem dim where the settlor, or even the life beneficiary, wishes to terminate the trust and there remains the possibility of unborn heirs. The guardian ad litem, in his fiduciary capacity, is necessarily limited in the kinds of compromise agreements he may make. At the same time the settlor is motivated by the desire to regain as much of the trust corpus as he possibly can. Given these two forces there seems to be no possible way to resolve the resulting stalemate.

The possibilities for termination are no better under the doctrine of virtual representation. The representatives may not bind unborn heirs to any compromise agreement which is not in the best interests of the unborn, and thus there is always the possibility of a later attack by heirs who come into being and feel that their interests were not adequately protected in the original suit.³⁸ If termination is no easier under virtual representation, the guardian ad litem should be preferred because of the advantage of additional safeguards to the interests of the unborn. But the appointment of the guardian ad litem is not, as may be thought, a way to promote alienability and flexibility in trusts. The guardian is appointed to protect the interests of unborn heirs to whom some kind of estate is limited (and the same is true for virtual representation). He cannot protect their interests by merely consenting to termination with little or no consideration. This means that there is an inability of the guardian ad litem to compromise his position.

This improbability of termination is very much in accord with the basic rules of trust law. Where the settlor has shown an original

³⁸ See note 25 *supra*.

intent to benefit those named in the trust agreement, he cannot subsequently change that intent and revoke the interest which he has given without consent of the beneficiaries.³⁹ So it is also with a gift. The donor cannot revoke a gift after delivery and acceptance merely because he has changed his mind and wishes its return. The rules which allow termination prior to fulfillment of the purpose of the trust, such as unforeseen and material changes of circumstances or a merger of interests, are designed to further effectuate the intent of the settlor or bring the trust agreement into focus with the realities of the situation. If the settlor and all the beneficiaries agree to the termination, there is no reason to interpret his original intent and the trust may be terminated. Despite his subsequent intent, however, the settlor cannot revoke the interest of the unborn and the guardian ad litem is appointed to see that there is no consent without consideration. This means that the trust will be terminated in very few cases.

In some ways such a result seems harsh to a settlor who has set up the trust primarily for his own benefit or who has unknowingly set up an irrevocable trust with a remainder limited to his heirs, and who now desires to terminate. Given the existing situation there is little he can do to terminate the trust. In some states provisions have been made by courts and legislatures for termination without the consent of the unborn and, although limited in scope, they may provide ways to somewhat alleviate the problem.

VII. POSSIBLE SOLUTIONS

Many state statutes provide that the settlor may revoke or terminate the trust where the trust was not expressly made irrevocable, even though no express power of revocation was reserved.⁴⁰ The settlor and all beneficiaries must consent to this termination, but the class of beneficiaries is limited to those in being at the time of the proposed termination. A statute providing that irrevocable trusts may be terminated will probably not be forthcoming because of many factors, among them the express intent of the settlor and the federal income tax laws. The statutes now in force, however, do relieve some of the problems with regard to termination.

³⁹ See note 1 *supra*.

⁴⁰ CAL. CIV. CODE § 2280 (West 1954); MD. ANN. CODE, art. 16, § 108 (1957); N.C. GEN. STATS. § 39-6 (1966); N.Y. PERS. PROP. LAW § 23 (McKinney 1962); OKLA. STATS. ANN. tit. 60, § 175.41 (1963); TEX. REV. STATS. ANN., art. 7425b-41 (1960); see G. BOGERT, TRUSTS AND TRUSTEES § 999 (2d ed. 1962).

Following the general principles behind these statutes it may be possible for the courts to expand upon the solutions which can properly be used in negotiating the termination of a trust. As many states have done already, the parties might be permitted to bring in evidence as to the physical impossibility of child-bearing.⁴¹ The rule of the possibility of unborn heirs would then become a rebuttable presumption and, if rebutted successfully, there would be no need for representation of any kind.

In certain cases it might also be possible for the court to play a greater role in looking into the intent of the settlor. For example, if a decedent set up a trust with income to his widow for life and the remainder to her children and the trust was not providing her with sufficient income, the court would look at the intent of the settlor to provide mainly for the widow and to benefit the children with the remainder only to the extent that funds were not needed for the widow.⁴² The court should be able to look more extensively into, or speculate as to, the settlor's intent and determine whether that intent would be best served by termination. In this situation it would be in the best interests of the unborn to have the guardian ad litem object and wait for the possibility of issue.⁴³ But it can be argued that the role of the guardian ad litem is not or should not be one of merely objecting to termination. Perhaps the only real requirement to making a decree which would bind the unborn heirs is that a guardian be appointed to actively contest the termination. He is perhaps not intended to stand in the way of termination but merely provide the court with an active contest of the interests of the unborn before any action is taken. The court would then have greater leeway in considering the equities on the side of the life beneficiary who wishes to terminate the trust for need of extra income or for other reasons. This takes away some of the obstructive effect of the guardian ad litem while preserving the interests of the unborn through advocacy proceedings. This gives the court opportunity to take both sides into account and render a more flexible and equitable decree as to all parties involved.

Giving the court this greater role of delving into the intent of

⁴¹ *In re Bassett's Estate*, 104 N.H. 504, 190 A.2d 415 (1963); see 98 A.L.R.2d 1285 (1964). But see, e.g., *P. v. Wilmington Trust Co.*, 41 Del. Ch. 109, 188 A.2d 361 (Ch. 1962).

⁴² This is done already in some situations. *In re Wolcott*, 95 N.H. 23, 56 A.2d 641 (1948). Note also that it is in this situation that the Pennsylvania courts have used the refunding bond. *Bowen's Estate*, 3 Pa. D. & C. 2d 401 (Orphans' Ct. 1955).

⁴³ See note 35 *supra* and accompanying text.

the settlor would certainly not provide a panacea for the problems of termination, but it would solve termination in some cases, particularly of the type just discussed. At the same time the court would not be depriving the unborn heirs of anything the settlor intended them to have, since it is working with the true intent of the settlor at the time he set up the trust and merely correcting his misapprehension as to the extent of his wealth. The unborn heirs would be bound by the judgment of the court, but not before their position had been fully vocalized by the advocacy of the guardian ad litem.

VIII. CONCLUSION

Under present law, the termination of a trust agreement by the settlor is not likely when there is the possibility of unborn heirs. The interests of the unborn require protection, whether that protection is given by virtual representation or the appointment of a guardian ad litem. But the interposing of these representatives to protect the unborn is the very thing which prevents termination altogether. Under virtual representation there is no real assurance of adequate protection for the unborn and because of this the decree may be later attacked by the unborn who come into being. The appointment of a guardian ad litem, while affording adequate protection, almost completely blocks any chance of termination, even in cases where the equities of the situation are in favor of termination. Due to his personal responsibility and court supervision the guardian ad litem has little chance to compromise his position. The inequity of this can be seen especially in cases, such as that discussed, of the needy life beneficiary. Particularly in that situation something is needed to reduce the inflexibility of the guardian's position.

The possibilities suggested in section VII do not by any means provide the complete answer to the problem of termination. They allow, however, termination where it is warranted by the circumstances of each case, and they ameliorate the rigidity which seems to be characteristic of the position of the guardian ad litem, a rigidity which leads one to question why, if the duty of the guardian ad litem were merely to object, we could not simply do away with the guardian and have a rule of law prohibiting trust termination when there is a possibility of unborn heirs. The interests of the unborn must be balanced against the interests of the settlor and the remaining beneficiaries who wish to terminate the trust. Under the present structure the interests of the latter cannot be readily accommodated. In many cases the situation warrants a compromise of the interests

of the unborn. The suggestions outlined in Section VII propose a possible way to accomplish this compromise without doing injustice to those interests.

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